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826-972—68

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 630

RICHARD T. BARNES, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The order of the Court of Claims of April 26, 1968 (Pet. App. 15–16) is reported at 183 Ct. Cl. 988. Its July 17, 1968, order (Pet. App. 16–17) denying reconsideration is not reported.

JURISDICTION

After entering its original order on April 26, 1968, the Court of Claims entered an order denying rehearing on July 17, 1968. The petition for a writ of certiorari was filed on October 10, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether, on the instant facts, the Court of Claims correctly held that the overtime compensation payable to petitioners was limited to that payable pursuant to 5 U.S.C. 926,[1] which provides for a flat percentage of annual pay in lieu of computation at the rate of 1½ times the hourly wage, as provided by 5 U.S.C. 911.

STATUTES INVOLVED

The relevant statutory provisions are set out in Appendix B to the petition (pp. 18–22).

STATEMENT

Petitioners, who are game management agents employed in Louisiana by the Department of the Interior, brought this action in the Court of Claims to obtain back pay allegedly due for overtime work performed subsequent to May 14, 1959. Upon cross-motions for summary judgment, the court granted judgment in part for petitioners and in part for the United States (Pet. App. 15–16). The relevant facts may be summarized as follows:

Each game management agent employed by the Bureau of Sport Fisheries and Wildlife, Fish and Wildlife Service, Department of the Interior, is assigned to a particular area for enforcement of federal game laws, including investigation of violations of such laws and apprehension of the violators. In order

[1] Title 5 of the United States Code was recodified by P.L. 89–554, 80 Stat. 378, September 6, 1966. The references in this brief are to the sections of Title 5 as they appeared in the 1964 edition of the Code.

to perform this work, game management agents do not work on regular schedules but rather tailor their hours and days of work to the demands of the job—*i.e.*, the agents often work at night or on weekends, rather than on weekdays, as the situation requires. Similarly, game management agents frequently work more than 40 hours a week.

Starting on July 1, 1962, the Department of the Interior, with the approval of the Civil Service Commission, determined to compensate game management agents like petitioners for their overtime work by paying them, in addition to their regular salaries, premium pay amounting to 15 percent of the minimum rate of the Civil Service Classification grade GS–9, pursuant to Sec. 401(2) of the Federal Employees Pay Act of 1945, as amended (then 5 U.S.C. 926 (1964 ed.)). Before that date, the Department of the Interior did not pay petitioners for any overtime work.

Petitioners alleged in the Court of Claims that at the relevant times they had worked "substantial regularly-scheduled overtime hours in excess of the regular forty-hour * * * work-week," and that they had also worked on holidays and at night. They alleged further that although such overtime work had been "officially ordered and approved by [their] * * * supervisors," petitioners had not been paid for it; therefore, they concluded, under 5 U.S.C. 911 they were entitled to overtime pay at the rate of 1½ times their ordinary hourly wage for each hour of overtime, and the amount of their overtime compensation was not limited by the 15-percent premium pay maximum pre-

scribed by 5 U.S.C. 926. They sought recovery of the back overtime pay that they maintained was due them.

The government answered by admitting that petitioners had worked in excess of 40 hours per week, but denied that such work was compensable under 5 U.S.C. 911, as to either the period before or after July 1, 1962.

On cross-motions for summary judgment, each supported by affidavits, the court below held that as to the period after July 1, 1962, petitioners were not entitled to recover overtime compensation in addition to that already paid them pursuant to 5 U.S.C. 926. As to the period between May 14, 1959, and July 1, 1962, for which no overtime had been paid, the court held that petitioners were entitled to recover back overtime pay, "with maximum recovery limited to the 15% premium compensation * * * [petitioners] would receive under 5 U.S.C. 926 * * *" (Pet. App. 15).

ARGUMENT

The decision of the Court of Claims properly implements the pertinent provisions of the Federal Employees Pay Act of 1945; there is accordingly no warrant for further review.

1. 5 U.S.C. 911 provides that employees covered by the Act (as are petitioners) are to be paid at the rate of 1½ times their ordinary hourly wage for each hour of overtime (*i.e.*, each hour in excess of 40 hours per week) if the performance of that overtime was

"officially ordered or approved."[2] For most government employees, this system worked quite well. For certain employees, however, such as the investigators of criminal activities, it was highly unsatisfactory. Such employees were obliged to work in the field, without direct supervision and control, and they decided themselves, of necessity without supervision, whether to work overtime in particular instances. It became apparent that the compensability of such overtime work under 5 U.S.C. 911 was "at best, a speculative matter" (*Burich* v. *United States,* 366 F. 2d 984, 988 (Ct. Cl.)) because of the difficulty both of establishing the number of hours of overtime actually worked, and of satisfying the statutory requirement that overtime work must be "officially ordered or approved" in order to be compensable.

To remedy this situation, Congress in 1954 amended the Act to provide a special method of payment of premium compensation on an annual basis to any employee "in a position in which the hours of duty cannot be controlled administratively, and which requires substantial amounts of irregular, unscheduled, overtime duty and duty at night, [on Sundays], and on holidays with the officer or employee generally being responsible for recognizing, without supervision, circumstances which require him to remain on duty * * *" (5 U.S.C. 926). The Senate Committee report favor-

[2] At the times relevant to the present action, the rate of overtime was limited to the minimum rate payable for the GS–9 classification (5 U.S.C. 911 (1964 ed.)); currently, the limitation is to the minimum GS–10 rate (5 U.S.C. 5542(a) (Supp. III)).

ing passage explicitly stated that the provision was "specifically directed at those investigators of criminal activities whose positions meet all the conditions specified" (S. Rep. No. 1992, 83d Cong., 2d Sess., p. 9). Congress provided that, in lieu of any overtime compensation under the time-and-a-half provision, such employees could (with the approval of the Civil Service Commission) be paid a flat sum as premium compensation in addition to their normal salary. Such premium compensation was to be computed as an appropriate percentage (not to exceed 15 percent) of that portion of their normal salary which did not exceed the minimum pay for the GS–9 classification.[3]

Thus, for employees like petitioners, Congress replaced the "essentially inadequate" time-and-a-half provision (*Burich* v. *United States, supra,* 366 F. 2d at 989) with the percentage premium pay provision of 5 U.S.C. 926. In doing so, Congress avoided the problem earlier encountered in attempting to apply 5 U.S.C. 911 to such employees. For instance, 5 U.S.C. 926 solves the administrative problem of keeping track of such employees' overtime hours by establishing a flat rate of premium pay, the rate to be appropriately set by the agency with the approval of the Civil Service Commission. The Commission's regulations provide that the rate of premium pay must

[3] By Section 217 of the Federal Salary Act of 1967 (81 Stat. 624, 638), Congress increased from 15 percent to 25 percent the maximum percentage of annual salary which may be payable as premium compensation. In addition, Congress has raised from GS–9 to GS–10 the limitation on that portion of an employee's salary which may be taken into account in determining the maximum premium compensation (P.L. 90–83, 81 Stat. 195, 200 (par. 27)).

reflect the amount of overtime generally worked (5 C.F.R. 550.154). In addition, the requirement in 5 U.S.C. 911 that overtime work be "officially ordered or approved" is obviated in 5 U.S.C. 926, which permits the payment of premium pay despite the fact that the employee himself may be "responsible for recognizing, without supervision, circumstances which require him to remain on duty."

This simple and sure method of compensating for irregular, administratively uncontrollable overtime work is clearly more workable and fairer to both employees and the government than the obscure and difficult manner of showing entitlement to overtime under 5 U.S.C. 911. As stated by the Civil Service Commission in recommending passage of the 1954 amendment (S. Rep. No. 1992, 83d Cong., 2d Sess., p. 18):

> Additional compensation on an annual basis [for qualifying employees] * * * would be easy to administer, fair to the Government, and equitable for the employees covered. The latter would be especially true for those investigators whose peculiar working conditions now frequently require substantial amounts of overtime work without any pay at all * * *.

2. Against this legislative background, the Court of Claims was here clearly correct in holding that, as to the period following July 1, 1962 (the effective date of the implementation of annual premium pay by the Department of the Interior), petitioners could not avoid the limitations on overtime pay in 5 U.S.C.

926 by seeking to recover additional sums through the application of 5 U.S.C. 911.[4]

Petitioners argue that 5 U.S.C. 926 may not be applied to them because, they allege, their overtime work was of such duration and regularity that it "fell outside the criteria for 15% premium pay" (Pet. 9). They emphasize that Section 926 states that annual premium pay "'may'" be provided (Pet. 9) by the agency with the approval of the Civil Service Commission, and argue that such provision here was erroneous. But this argument is, at most, a claim that the Civil Service Commission ought not to have approved the plan of the Department of the Interior to institute the annual premium pay system for its game management agents. And the Commission's determination to approve or disapprove an agency's proposal to place some of its employees under the annual premium pay plan is clearly unreviewable. *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297; *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309. In any event, because 5 U.S.C. 926 was passed for the explicit purpose of providing compensation for criminal investigators like petitioners (see *supra*, p. 6), the de-

[4] Petitioners' contention that Congress could not have intended such a construction of the Federal Employees Pay Act when certain provisions of the Fair Labor Standards Act (29 U.S.C. 201 *et seq.*, 52 Stat. 1060) are considered (Pet. 11–12) is without substance. As petitioners recognize, the latter statute has no application to government employees. In any event, both statutes recognize the principle that premium pay for irregular overtime work should bear a reasonable relationship to the time worked. Application of 5 U.S.C. 926 here thus produces a result not inconsistent with the spirit and purpose of the Fair Labor Standards Act (see *infra*, pp. 9–10).

cision of the Commission to approve petitioners' coverage under Section 926 was hardly arbitrary or unreasonable.

Petitioners also maintain that they worked so many overtime hours that their 15-percent premium pay bears no reasonable relation to the hours they worked, and that therefore Congress could not have intended Section 926 rather than Section 911 to govern the amount of their overtime pay.[5] However, the reasonableness of the application of Section 926 to petitioners is immediately apparent upon consideration of the basic purpose of Section 926—to relieve both the government and its employees of the administrative unworkability of Section 911 when applied to employees like petitioners. Because of those difficulties, as the Court of Claims has pointed out, the entitlement of federal employees to overtime compensation for administratively uncontrollable overtime under Section 911 had been "at best, a speculative matter" (*Burich* v. *United States, supra,* 366 F. 2d at 988). In enacting Section 926, Congress thus relaxed the strict requirements for entitlement to time-and-a-half overtime under Section 911 while establishing a method providing for a certain, but limited, amount of premium pay—surely a reasonable compromise. Moreover, there can be no question that Congress intended Section 926 to apply even to employees who worked

[5] Petitioners' claim that they each averaged about 20 overtime hours per week was neither accepted nor rejected by the court below; nor did that court reach the question whether their records in regard to overtime work were adequate.

substantial amounts of overtime.[6] Indeed, the Court of Claims rejected the very same contention here raised in *Fix* v. *United States*, 368 F. 2d 609, 616 (Ct. Cl.):

> Congress was unmistakably aware that the * * * [1954] Act was intended to govern the extra compensation of investigators, and it also knew that these employees performed many hours of overtime duty. * * * In these circumstances Congress could not help but recognize that the 15% premium compensation would often amount to far less than straight-time if calculated by the hours of overtime. To accept plaintiff's contention would thus be to render the 1954 Act almost wholly useless for the very segment of federal employment Congress deliberately sought to cover.[7]

3. Petitioners also contend that the Court of Claims erred in holding that they were limited to 15 percent-premium compensation during the period previous to July 1, 1962. Instead, they assert, they should be allowed to establish their entitlement to overtime compensation pursuant to Section 911 for that period. That argument does not, however, avail petitioners,

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[6] The statement of the House managers appended to the Conference Report and the Senate Report favoring passage of the 1954 amendment recognized that employees to be covered by Section 926 worked "substantial" amounts of overtime (H. Rep. No. 2665, 83d Cong., 2d Sess., p. 23; S. Rep. No. 1992, 83d Cong., 2d Sess., p. 8).

[7] It should also be noted in this connection that Congress has recently amended Section 926 (now Section 5545; see note 3, *supra*), raising to 25 percent the maximum percentage of an employee's annual salary which may be payable as premium compensation. That change serves to ensure further that the compensation payable under this provision bears a reasonable relationship to the number of hours of overtime worked.

because the record gives no indication that petitioners can demonstrate that their overtime work for that period was performed pursuant to written authorization or approval in accordance with the Civil Service Commission's regulations (5 C.F.R. 550.111(c)) or with the then-pertinent regulations of the Department of the Interior (Section 2212A of the Field Manual of the Fish and Wildlife Service, Department of the Interior, set out in Appendix B1 to Defendant's Opposition to Plaintiffs' Motion for Summary Judgment, etc., filed October 12, 1967).[8] Without such a showing, petitioners cannot recover under Section 911. *Gaines* v. *United States,* 132 Ct. Cl. 408.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1968.

[8] Indeed, it is at least questionable whether petitioners are properly entitled to overtime compensation for the period prior to July 1, 1962, under Section 926, since that is the date after which the Department of the Interior was authorized to commence paying employees like petitioners for overtime work performed by them under that section (see *supra*, p. 3). However, the government did not contest such an application of Section 926 in the court below, and that court determined that it could be so applied (see *supra*, p. 4).

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